

withdraw that Office action and issue a new, nonfinal action. The January 31, 2002, Office action ensued.

The January 31, 2002, Office action objected to Claim 45 under 37 C.F.R. § 1.75(c) as not further limiting the claim, Claim 44, from which it depends. Applicant respectfully traverses this objection.

Claim 44 recites that the film of fluorinated polyethylene is “substantially continuous”. This permits slight, insignificant discontinuities. Claim 45 requires this film to be “continuous”. The removal of the term “substantially” imposes a tighter restriction on Claim 45 than on Claim 44. Accordingly, it complies with the rules, and the objection should be withdrawn.

Claims 44 and, apparently 46, 55, 56, and 58, were rejected under 35 U.S.C. § 112 as vague, unclear, indefinite, and/or lacking sufficient antecedent basis. Applicant respectfully traverses these rejections.

With regards to Claim 44, the rejection maintained that “one of ordinary skill in the art can not determine which substance is in which layer”. Initially, the “ordinary skill in the art” standard has no relevance to Section 112 of the statute. That standard relates to Section 103. Further, the term “skilled in the art” relates to the specification, not the claims. In any event, the claim particularly points out and distinctly claims the appropriate subject matter. The container has a wall defining an interior and an exterior. Part of the wall comprises a layer having a post-consumer recycled (“PCR”) polyethylene resin. Wherever that occurs, the container has a substantially continuous film of fluorinated polyethylene. This continuous film of fluorinated polyethylene lies toward the interior of the container from the PCR. This protects the container’s contents from the contaminants possible in the PCR. Further, the PCR need not occur over the entire wall of the container. It need only occur at a portion of the wall. At this portion, the

fluorinated polyethylene sits to provide the desired protection. The claim specifically recites this structure. No indefiniteness can possibly result.

Claim 44 was further rejected for using the term “substantially continuous”. Again, the inappropriate standard of “one of ordinary skill in the art” appears. In any event, the word “substantially” permits discontinuities that do not permit impurities exceeding the permissible limits as set forth in the specification. No ambiguity can possibly result. The term “substantially” finds frequent use and has received approval from the Court of Appeals for the Federal Circuit. See, for example, the case of *LNP Engineering Plastics Inc. v. Miller Waste Mills Inc.*, 61 U.S.P.Q.2d 1193 (Fed.Cir. 2001). No violation of section 112 can result.

With regards to Claims 46 and 58, the examiner found “insufficient antecedent basis for [the] limitation [of 48 ppb./0.020 of contaminant] in the claim.” This numerical limitation does not require an antecedent basis *in the claim*. The purpose of the claims is to set forth this limitation as part of the invention of these claims. This requires no antecedent basis. If the examiner has reference to the specification, then page 11, lines 9 to 14, provides the required description.

The rejection next refers to the term “insufficient thickness” in Claim 55. No such phrase appears in the claim. The claim does state that film should have “a sufficient thickness.” The skilled artisan can well run simple experiments to determine an adequate thickness for the purpose stated of limiting the passage of excessive amounts of contaminant. This provides full compliance with the statutory mandates.

Lastly, Claims 55 and 56 were rejected as vague and indefinite for incorporating the term “capability of”. The examiner states that, “Either the film prevents the passage of PCR or it does

not.” Presumably, instead of PCR, the examiner has reference to contaminants in the PCR and not the PCR itself.

Again, the skilled artisan would know how to create a fluorinated film on the polyethylene and then test it to see if it blocked the passage of the contaminants. This minor taks presents no difficulty whatsoever. If it prevents the passage of excessive amounts of contaminants, then it falls within the ambit of the claim. If not, then it does come within the scope. No ambiguity can result. As a result, the rejection of the claims under section 112 should be withdrawn.

Claims 44 to 56 and 58 were rejected under 35 U.S.C. § 103(a) as obvious over Moore et al. in view of Mehta et al. Applicant respectfully traverses this rejection. Moreover, this rejection closely resembles the rejection in the June 28, 2001, of Claims 44 to 54 and 58 over Mehta et al. in view of Moore et al. No explanation has appeared as to why the examiner has considered the response to this earlier rejection unpersuasive. Accordingly, the following response to the current rejection closely resembles the prior response to the first rejection.

Applicant’s invention, as set forth in the independent Claim 44, recites a container which has a wall defining an interior and an exterior. At least part of the container’s wall comprises a layer having a post-consumer recycled (“PCR”) polyethylene resin. Futher, wherever the PCR-containing layer occurs, the container has a substantially continuous film of fluorinated polyethylene. This fluorinated polyethylene is located toward the interior of the container from the layer with the PCR material. The fluorinated layer has the purpose and effect of reducing the migration of possible contaminants from the PCR polyethylene into the container’s interior and especially into material within the interior.

Moore et al. show a container composed of PCR's "to package liquid detergent products" (Col. 1, lines 24-25.). The container, as in Moore et al.'s Figure 3, may find use without any inner layer over the PCR whatsoever. Alternately, the inside of the container may have a layer of virgin polyethylene (Figure 3) to protect the contents of the container or of nylon (Figure 4) to allow the container to "hold solvent products such as petroleum distillates." (Col. 5, line 25.)

The examiner is simply incorrect where she states that "Moore teaches the use of post consumer recycled polyethylene in the production of plastic beverage and food containers due to the large quantities available to reduce and cost." [Citations omitted.] In fact, the only mention of beverage containers (in the location cited by the examiner of col. 1, lines 34 to 37) simply states that such containers *provide* the PCR's. They do not *make use of the PCR's in their production*. As stated and established above, Moore et al. can only use PCR's for detergents and petroleum distillates. They do not and cannot use them to produce containers holding human-consumable products.

Mehta et al. do not supply or overcome the deficiencies of Moore et al. As the examiner correctly states, Mehta et al. disclose a container having an outer layer of polypropylene and an inner layer of polyethylene. The interior surface of the container, composed of the polyethylene, has undergone reaction with fluorine to result in a fluorinated polyethylene.

In Mehta et al., the fluorinated polyethylene has the purpose of preventing the "scalping of flavor or aroma components (of the container's contents) into the walls of plastic container" (See column 1, lines 11-12.) "The interior fluorinated polyethylene layer imparts the container with good flavor/aroma barrier properties" (Col. 2, lines 44-46.) In other words, the fluorinated polyethylene simply prevents the loss of the minute amounts of flavor and aroma

compounds *from* the container's contents *into* the container's wall. The barrier prevents the absorption of these ingredients by the wall.

The examiner suggests that "Mehta teaches a plastic container comprising a film of a fluorinated inner layer for the purpose of protecting the contents of the container where needed." However, this was only for the purpose of *preventing scalping of the contents' ingredients*. Nowhere does the reference suggest using the film for preventing the migration of serious contaminants from PCR's or anything else through the film into the contents of the container.

Clearly, Mehta et al. nowhere suggest that a fluorinate polyethylene layer can prevent the migration of very undesirable contaminants from a PCR layer *into* the contents of the container, and do so with sufficient effectiveness that the container may then hold a liquid that will be ingested by humans. In fact, Mehta et al. simply do not even consider PCR's let alone the migration of contaminants from PCR's into materials held by a container constructed, in part, from such PCR's with contaminants.

In light of the above, the rejection over this combination of references should be withdrawn. First, the two references simply cannot combine. Mehta et al.'s containers hold ingestible liquids where the fluorinated surface reduces the absorption *from* the liquid *into* the container of flavor and aroma molecules. In distinction, Moore et al. present containers to hold detergents or solvents such as petroleum distillates. The use of flavor/aroma scalper preventatives of the former has no use whatsoever in the latter. In other words, there is no suggestion or reason to combine the references.

Second, even were the two references to combine, they would still have no suggestion that a layer of fluorinated polyethylene would prevent or reduce the migration of PCR contaminants from a container wall into the material inside the container. In fact, taking the two

references together, there is no suggestion that the fluorinated polyethylene prevents the migration of anything from the container wall into the container's contents, and can do so to leave the container's contents fit for human consumption. In fact, Moore et al. teach that polyethylene itself (as in their Figure 2) suffices as a protective layer. Accordingly, the references, whether taken alone or together, fail to teach the utility of fluorinated polyethylene as a barrier to the migration of PCR contaminants. Moreover, the references teach away from Applicant's claims by utilizing polyethylene without fluorination as a barrier for PCR-containing material. Accordingly, the rejection should be withdrawn.

In addition to the above, the references, in light of the above, clearly cannot teach using a fluorinated polyethylene to protect a container's contents from the levels of contaminants set forth in Claim 46 or where the PCR constitutes the weight percents of the container of Claims 49 and 50. Nor does the combination show any utility for the level of PCR contaminant recited in Claim 58. For these reasons as well, these claims show patentable merit over the cited references.

Finally, the statement on page 5, the second half of the first full paragraph, of the rejection ("Thus, it would have been obvious . . . into the contents of the container.") constitutes the use of hindsight to create Applicant's invention. Such an approach is strictly forbidden. Further, for the reasons given above, especially that Mehta et al do not use a fluorinated polyethylene to block the passage of contaminants, the statement is simply wrong.

Claims 57 and 59 were rejected under 35 U.S.C. § 103(a) as obvious over Mehta et al. in view of Moore et al. and Strum et al. Applicant respectfully traverses this rejection.

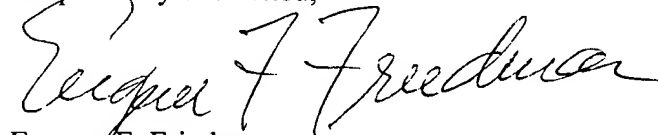
As discussed above, the combination of Mehta et al. and Moore et al. fail to teach the basic elements of Applicant's claimed invention. Strum et al. have no teaching of fluorinated polyethylene as a barrier to the migration of PCR contaminants into a container's contents and

thus simply fail to supply the deficiency of the prior combination. In fact, Strum et al. merely relate to extruding a multilayer container with the intermittent inclusion of one or more layers into the structure. Strum et al.'s barrier layer, such as ethylene/vinyl alcohol copolymer (col. 5, lines 5-6) represents a standard barrier to oxygen, not PCR contaminants. Additionally, in Strum et al, "the reground material [is] recovered from by trimming the parison in the process of blowmolding articles therefrom." (Col 1, lines 44 to 46.) Thus, the reground material has never seen consumer use and thus simply does not constitute "PCR". As a result, Strum et al. add nothing to the combination of Mehta et al. and Moore et al. Thus, the rejection based on this combination of references should be withdrawn.

Applicant believes that the above should place his application in condition for allowance. However, if some minor impediment prevents this action, the examiner is then respectfully requested to telephone Applicant's attorney at the number given below. This would portend the saving of substantial effort and cost on the part of both the Patent and Trademark Office and Applicant.

The present paper appears to respond timely to the January 31, 2002, Office action. Accordingly, no extension fee appears required. However, should that prove that incorrect, then any required extension fee may be charged to Deposit Account 06-2135 of the undersigned attorney.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Eugene F. Friedman".

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on April 30, 2002.



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